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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 309

S. P. KELLY, TRUSTEE IN BANKRUPTCY FOR THE CARLISLE PACKING COMPANY, A CORPORATION, BANKRUPT, PETITIONER

v.

UNITED STATES OF AMERICA, AND THE COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, AND THE COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 10) is reported in 29 B. T. A. 514. The opinion of the special referee in bankruptcy (R. 90) is not reported. The memorandum decision of the

District Court (R. 138) is reported in 12 F. Supp. 11.

The opinion of the Circuit Court of Appeals (R. 158) is reported in 83 F. (2d) 783. The opinion on the petition for rehearing (R. 163) is not yet reported but is published in Vol. 4, C. C. H., 1936, p. 9399.

JURISDICTION

The decree of the Circuit Court of Appeals affirming the decision of the District Court was entered on May 5, 1936 (R. 162). Petition for rehearing was filed on June 1, 1936, and order denying same was entered June 29, 1936 (R. 163). The petition for a writ of certiorari was filed on August 24, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, on an appeal from a decision allowing a claim against a bankrupt estate for income taxes in excess of $500, the Circuit Court of Appeals properly refused to examine into the merits in the absence of any statement of the evidence duly verified by a certificate of authentication of the District Court.

2. In the alternative, should the Circuit Court of Appeals remand the case to the District Court to have statement of the evidence authenticated under Equity Rule 75 (b).

STATUTES, EQUITY RULES, AND GENERAL ORDERS IN BANKRUPTCY INVOLVED

These will be found in the Appendix, *infra*, pp. 11–13.

STATEMENT

On December 6, 1933, the United States Board of Tax Appeals promulgated its opinion and findings in two consolidated cases of the *Carlisle Packing Co.* v. *Commissioner,* Docket Nos. 55209 and 64926, approving and confirming income tax deficiencies for the fiscal years ended November 30, 1927, 1928, and 1929, in the respective amounts of $12,429.82, $1,435.49, and $1,473.88, which had theretofore been asserted by the Commissioner of Internal Revenue in deficiency letters to that corporation (R. 9–13). Pursuant to that opinion, final orders and decisions were entered in those two proceedings by the Board on January 4, 1934, that there were deficiencies in the income taxes of that corporation for the three taxable years and in the respective amounts above shown (R. 16, 19). No appeal was ever taken from those decisions of the Board (R. 93).

On January 10, 1934, a receiver for the taxpayer corporation was appointed by the Superior Court of the State of Washington for the County of Whatcom (R. 92). Under an involuntary petition in bankruptcy filed against it on January 19, 1934, the taxpayer was adjudicated a bankrupt on February 9, 1934, in the United States District Court for the Western District of Washington, Northern

Division (R. 2). In June 1934 the Collector of Internal Revenue filed sworn proof of claim in bankruptcy covering assessments of income tax deficiencies for the three taxable years in question in the principal sums above mentioned, aggregating $20,515.52, plus interest (R. 3–5).

After hearing upon the trustee's objections, the special referee in bankruptcy disallowed the claim in full on December 31, 1934 (R. 90–102). Petition to review the referee's order and decision was filed by the United States Attorney on January 7, 1935 (R. 107–112), and was heard by the District Court on February 18, 1935. At that hearing, the District Judge permitted the parties to put additional evidence into the record (R. 112–113). On May 6, 1935, the District Court reversed the referee's order and entered decree in favor of the United States for the full amount above mentioned, plus interest as a priority claim under Section 64 (a) of the Bankruptcy Act, as amended (*infra,* p. 11), against the bankrupt estate (R. 115). On June 1, 1935, petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit from that decree (R. 115–124).

Pursuant to a praecipe served and filed by the petitioner (R. 128–130), the clerk of the District Court on August 13, 1935, certified to the correctness of a typewritten transcript of certain portions "of the record, papers and other proceedings in the * * * cause as is required by praecipe of counsel" (R. 131–132).

The transcript so certified was duly filed in the Circuit Court of Appeals (R. 133). It contained no certification of authenticity as to any statement of evidence submitted to and acted upon by either the referee or the District Judge successively. The Circuit Court of Appeals, by a divided court, held that the evidence was not properly brought into the record before it and that it could not therefore consider the petitioner's assignments of error because they raised questions the consideration of which would require an examination of the evidence. It accordingly affirmed the judgment of the District Court (R. 157–162). In denying the petition to rehear, again by a divided court, the court below rejected the suggestion that the case be remanded to the District Court to supply a properly authenticated statement of the evidence by a supplemental transcript (R. 161, 167–168). The question of sufficiency of the record was first raised upon the court's own motion in the Circuit Court of Appeals (R. 158–161).

ARGUMENT

1. The petitioner concedes (Br. 7) that the statement of evidence which is set forth in the transcript of record in the present case was not properly authenticated. He states that his failure to comply with the rule regulating the manner of preparing and certifying the statement of evidence on appeal was inadvertent, and seems to argue that the court below should have disregarded the imper-

argue that the questions presented to the court below did not depend upon an examination of the evidence. If this is so, clearly the court below was correct in refusing to go into those questions.

It is clear from petitioner's assignment of errors to the court below (R. 119) that many, if not all, of those assignments could not be considered without looking to the evidence. The only question presented by those assignments which the petitioner seeks this Court to review is the question of *res judicata*. It is not entirely clear that a determination of that question would not require a consideration to some extent of the evidence taken before the referee, and this evidence is not properly in the record on appeal. From the opinion filed by the court below on the petition for rehearing (R. 163, 164), it would appear that the petitioner argued there that consideration of the question of *res judicata* would not require an examination of the evidence, but as petitioner does not make a like contention here we assume that he no longer presses that point.

2. The petitioner, under the heading "First Point", states (Br. 2) that the court below "erroneously decided that the bankruptcy court was without jurisdiction to hear and determine the amount and legality of a claim for income taxes, not justified by the facts and contrary to the decisions of this court and contrary to the rulings of other Circuits and contrary to the weight of the

authorities." If this statement be taken as petitioner's specification of error and if it be construed as raising the question of *res judicata*, as petitioner evidently intends it to, it should be noted that the court below did not pass upon the question. If the court below could have properly passed upon the question, it would have been necessary, we submit, for that court to have affirmed, as it did upon another ground, the judgment of the District Court.

None of the decisions cited by the petitioner involves the effect in a bankruptcy court of a final decision of the Board of Tax Appeals rendered after the enactment of the Revenue Act of 1926, and, so far as we have been able to ascertain, the present case is the first in which the precise question here raised has been presented. The reasoning of analogous cases, though, leads inevitably to the conclusion that the tax liability of a bankrupt corporation which has already been adjudicated by a final decision of the United States Board of Tax Appeals under an appeal taken to the Board by the taxpayer after the enactment of the Revenue Act of 1926, may not be relitigated in a bankruptcy court. Cf. *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 728; *Bankers' Reserve Life Co.* v. *United States*, 44 F. (2d) 1000 (C. Cls.), certiorari denied, 283 U. S. 836; *Green* v. *MacLaughlin*, 55 F. (2d) 423 (E. D. Pa.); *Brampton Woolen Co.* v. *Field*, 56 F. (2d) 23 (C. C. A. 1st), certiorari denied, 287 U. S. 608.

CONCLUSION

There is no conflict of authority upon the points made by the petitioner, and the decision below reached the correct result. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1936.

APPENDIX

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended:

SEC. 25. *Appeals.*—(a) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals of the United States, * * * in the following cases, to wit: * * * (3) from a judgment allowing or rejecting a debt or claim of $500 or over. * * *. (U. S. C., Title 11, Sec. 48 (a).)

SEC. 63. *Debts provable against.*—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or * * *, absolutely owing at the time of the filing of the petition against him, * * * (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, * * *. (U. S. C., Title 11, Sec. 103.)

SEC. 64. *Debts which have priority.*—(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in the order of priority as set forth in paragraph (b) hereof: * * * and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. * * * (U. S. C., Title 11, Sec. 104.)

General Order in Bankruptcy XXXVI, as amended April 17, 1933, 288 U. S. 621, 632:

APPEALS

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in courts of the United States.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 274. BANKRUPTCY AND RECEIVERSHIPS.

(a) *Immediate assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

United States Supreme Court Equity Rules, as amended May 31, 1932, 286 U. S. 570:

> RULE 75. RECORD ON APPEAL—REDUCTION AND PREPARATION.
>
> In case of appeal:
>
> (a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a praecipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. * * *
>
> (b) The evidence to be included in the record, * * * shall not be set forth in full, but shall be stated in simple and condensed form, * * *. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his praecipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, * * * the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

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